Supreme Court, U. S.
FILED
MAY 1 1975
MICHAEL RODAK, JR., CLERK

No. 74-538

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

HENRY OGLE WATSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
JOHN C. KEENEY,
Acting Assistant Attorney General,
ANDREW L. FREY,
Deputy Solicitor General,
FRANK H. EASTERBROOK,
Assistant to the Solicitor General,
PETER M. SHANNON, JR.,
KENNETH A. HOLLAND,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A-8A) is reported at 504 F. 2d 849.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9A) was entered on March 20, 1974. The government's petition for rehearing and suggestion for rehearing *en banc* was denied on September 5, 1974 (Pet. App. 10A). By order of October 2, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including November 4, 1974. The petition was filed on that date and was granted on

February 18, 1975. The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an arrest warrant is required in order to make an arrest in a public place.

2. Whether a person unlawfully in custody is capable of giving a voluntary consent to a search of his automobile.

CONSTITUTIONAL PROVISION, STATUTE AND REGULATION INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. 18 U.S.C. 3061 provides:

> (a) Subject to subsection (b) of this section, officers and employees of the Postal Service performing duties related to the inspection of postal matters may, to the extent authorized by the Board of Governors—
>
> (1) serve warrants and subpenas issued under the authority of the United States;
>
> (2) make arrests without warrant for offenses against the United States committed in their presence; and

> (3) make arrests without warrant for felonies cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such a felony.
>
> (b) The powers granted by subsection (a) of this section shall be exercised only in the enforcement of laws regarding property of the United States in the custody of the Postal Service, including property of the Postal Service, the use of the mails, and other postal offenses.

3. 39 C.F.R. 232.5(a) provides in relevant part:

> Postal Inspectors are authorized to * * *
>
> (3) Make arrests without warrant for felonies cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such a felony.

STATEMENT

1. On August 17, 1972, Postal Inspector Frank Barbarick received a telephone call from Awad Khoury, an informant who had proved reliable on at least five prior occasions.[1] Khoury told Barbarick that respondent was in possession of a stolen Bank of America credit card in the name of Syed T. Ahmad and planned to turn the card over to Khoury (A. 12–13). Later that

[1] Khoury previously had provided Inspector Barbarick with information about certain associates of respondent whom postal inspectors had under investigation or had arrested for mail theft prior to August 17 (A. 51–52). The information received from Khoury was corroborated by the agents' investigation of the mail thefts and their interviews of postal inspectors and mail carriers (A. 53).

day Khoury met with Barbarick and turned over the credit card he had described (A. 13). Barbarick ascertained from the Bank of America that the credit card had been mailed on August 14, 1972, but had not been received by the intended customer.

Khoury told Barbarick that he and respondent had an agreement: respondent would furnish Khoury with additional credit cards stolen from the mail, and Khoury would purchase airline tickets and other merchandise with the cards (A. 14). Respondent had promised to reimburse Khoury for his "time and efforts" (A. 15). Barbarick instructed Khoury to set up another meeting with respondent to obtain the additional credit cards (*ibid.*). Although there was sufficient time to have obtained a warrant for respondent's arrest, Barbarick did not attempt to do so (A. 23). After several postponements, a meeting between Khoury and respondent was arranged for noon on the 23d of August at the Ship's Restaurant in Los Angeles (A. 16).[2] At the designated time, Khoury met with respondent. Two postal inspectors were stationed in the restaurant. Barbarick had instructed Khoury that if respondent were in possession of stolen credit cards, Khoury should light a cigarette as a signal to the surveilling agents in the restaurant; the agents then would activate a beeper signal informing the agents positioned outside of visual range (A. 17).

[2] On August 21, Khoury had informed Barbarick that there would be a meeting the next day. This meeting was cancelled by respondent, as was a meeting for the morning of August 23 (A. 15–16).

At this meeting Khoury learned that respondent had the credit cards outside in his car (Tr. 246).[3] Khoury lit a cigarette and the agents in turn activated their signal. Inspector Barbarick and other agents entered the restaurant and placed respondent under arrest for possession of stolen mail (A. 17–18), and specifically for possession of the card Khoury had turned over to Barbarick six days earlier (A. 23).

Postal inspectors immediately searched respondent, but they did not find any credit cards (A. 81). The inspectors escorted him out of the crowded restaurant. Once outside, respondent was informed by Inspector Barbarick (A. 18)

> [t]hat he had a right to remain silent. That anything he stated could be used against him. He had a right to an attorney before answering any questions. If he could not afford an attorney, one could be provided for him. And that if he wished to answer questions, he could stop at any time and request an attorney.

Respondent, who previously had been an informant for Inspector Barbarick and knew him well,[4] replied: "Frank [Barbarick], I understand my rights" (*ibid.*). Barbarick asked respondent where his car was parked, and respondent "pointed to a beige Monte

[3] Khoury did not tell the agents at the scene that the cards were in respondent's car (Tr. 246).

[4] Inspector Barbarick had known respondent for approximately a year and a half. Barbarick had arrested respondent in 1971 for mail theft, but the charges were dropped after respondent supplied information that led to the arrest of "a major violator in mail theft" (A. 33). During 1971 and 1972 additional information furnished by respondent led to other convictions for mail theft (A. 45; cf. A. 84–85).

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Carlo Chevrolet in the parking lot" (*ibid.*). The inspector asked (A. 18–19):

> "Can I look inside?"
>
> And he [respondent] said, "Go ahead."
>
> [Barbarick] said, "You know, if I find anything, it is going to go against you."
>
> And he [respondent] said, "Go ahead, there is nothing in there."

Using keys furnished by respondent after this series of warnings, request to search, consent, repeated warning, and reaffirmation of consent, Barbarick and another postal inspector searched the car. Under the floor mat they found two stolen credit cards, and these, together with the card provided by Khoury, formed the basis for the indictment returned against respondent (A. 19–20, 80–81).

2. Respondent was charged with four counts of possession of stolen mail, in violation of 18 U.S.C. 1708 (A. 6–7). Prior to trial he moved to suppress the stolen credit cards, arguing that Khoury was an unreliable informant, so that there was not probable cause to arrest respondent; that a warrant was required for respondent's arrest; and that the consent was defective because respondent had not been told that he could withhold his consent (A. 36–40). The district court denied the motion from the bench (A. 40). Respondent was convicted on the two counts charging possession of the two credit cards found in his automobile. He was acquitted on a third count charging him with possession of the stolen credit card

provided to Inspector Barbarick by informant Khoury. The fourth count was dismissed prior to trial.

3. A divided panel of the court of appeals reversed. The majority concluded that the information gathered by Inspector Barbarick on August 17 from a reliable informant, confirmed by the physical receipt of a stolen credit card, provided probable cause to arrest respondent (Pet. App. 5A). The court held, however, that because the officers had not sought or obtained a warrant for respondent's arrest during the six days between the acquisition of probable cause and the meeting at Ship's Restaurant, the arrest was unconstitutional. Relying upon *Coolidge* v. *New Hampshire*, 403 U.S. 443, 480, the majority reasoned that an arrest warrant always is required in the absence of exigent circumstances. Because the court found no exigent circumstances here, it concluded that the arrest was improper.

Proceeding from the conclusion that respondent was under unconstitutional arrest, the majority then held that the consent to search the car was defective. Although it purported to adhere to the "totality of all the circumstances" test enunciated in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227, the majority found that the consent was involuntary because respondent "was in custody in violation of the Fourth Amendment" (Pet. App. 7A). The court therefore held that, even in the absence of any other circumstance suggesting coercion, the credit cards must be suppressed.

Judge Goodwin, in dissent, expressed the view that law enforcement officers are not compelled to secure an arrest warrant or make an arrest "the moment they come into possession of enough evidence to cause a magistrate to issue a warrant" (Pet. App. 8A), and that they were entitled to arrest respondent on the basis of information (including the signal at the restaurant) provided by Khoury, a reliable informant. Judge Goodwin concluded that "[g]iven a lawful arrest, the only basis Watson urged in the trial court for his motion to suppress the evidence collapses" (*ibid.*).

SUMMARY OF ARGUMENT

I

At common law, warrants for arrest were viewed with suspicion. They could be used to harass enemies and escape tort liability for wrongful arrest or detention. The common law of England, state law, and our Fourth Amendment jurisprudence have used the requirement of probable cause, without any warrant requirement, to accommodate the conflicting interests of the individual in remaining free of unjustified restraints and of society in capturing those suspected of crime.

This Court has held that the general common law rule—that an arrest for a felony could be made without a warrant if there is probable cause—is congruent with the Fourth Amendment's requirement of reasonableness. At least where the arrest is made in a public place (and therefore does not require entry into a place where a warrant would be required in order to

make a search), this Court has never required a warrant to make an arrest on probable cause. The validity of that basic rule was recently reaffirmed in *Gerstein* v. *Pugh*, No. 73–477, decided February 18, 1975.

The fact that there was time to obtain a warrant does not affect the reasonableness of an arrest. An arrest always has been viewed as constitutionally reasonable if it is supported by probable cause, and the presence of probable cause does not depend upon obtaining a warrant. There is no reason for the Court now to depart from the established historical understanding. Moreover, although superficially the reasons for requiring warrants for searches might seem to apply to arrests as well, there are important logical and practical reasons for the distinction. The law of arrest historically has developed separate safeguards, such as the prompt post-arrest inquiry into probable cause, that guard against improper detention of a suspect.

Indeed, it might be counterproductive to attempt to compel officers to obtain and execute warrants as soon as they accumulate probable cause to do so. Sometimes the warrant would be executed before more thorough investigation had been completed, which investigation might be necessary either to accumulate the additional evidence necessary to convict (since far less evidence is necessary to make out probable cause than may be sufficient to convince a jury) or to demonstrate that, in spite of the information establishing probable cause, the suspect is innocent. Premature arrest risks both incarceration of the innocent and provision of an unjustified boon to the guilty.

On the other hand, if execution of the warrant is postponed in order to avoid the problems caused by premature arrest, a suspect might claim that he had been unfairly prejudiced by the delay. Moreover, the warrant would become of less value to the suspect, for as the investigation proceeded, new information would supplant the old and make the warrant "stale." In this case, information (Khoury's signal) acquired practically at the moment of arrest would have provided a better ground for arrest than a warrant issued five days earlier.

In short, if a warrant is obtained and executed immediately, it may disserve the interests of both suspects and the criminal justice system. If the warrant is obtained and execution is deliberately delayed while law enforcement officials continue their investigation of the case in a quest for confirmation or rebuttal of their initial suspicions, it becomes stale at the same time as the reasons for preferring a warrant to a hasty on-the-spot judgment dissipate. We submit that the requirements of the Fourth Amendment are fulfilled whenever the arrest is supported by probable cause.

II

It is not constitutionally unreasonable for an officer to seek, or act upon, a consent to search. The consent defines the individual's desire for privacy; to the extent an individual consents to a search, he is indicating that he does not wish to exclude the officers from particular areas in which he might otherwise establish a zone of privacy. But once he voluntarily allows inspection of that which he could keep hidden, he cannot complain that it was unreasonable for the officers

to accept the invitation, unless the words expressing consent were induced against his will.

Under the standards established in *Schneckloth* v. *Bustamonte,* 412 U.S. 218, a consent to search is effective unless it has been obtained as a result of duress or coercion. The presence of such coercion is to be evaluated upon the basis of the totality of all the circumstances, and no one factor possesses a determinative significance. Accordingly, even if the Court concludes (or assumes for the purpose of discussion) that respondent's arrest was unconstitutional, his consent to search was effective.

Schneckloth held that this inquiry would utilize the standards developed in cases dealing with the voluntariness of confessions. The test is not whether the consent was "informed" or "wise", but whether it was the result of such official pressure that the conduct of the officials can be deemed "unreasonable" under the Fourth Amendment. We submit that the arrest and custody of an individual, like his knowledge (or lack of knowledge) of the ability to withhold consent, is simply one factor among many to be considered in ascertaining whether officials improperly induced the individual to consent to the search. Arrest and confinement take many forms, from lengthy stationhouse interrogation (in which improper inducement might often be found) to brief, relatively spontaneous open-air discussions, such as the one in this case, in which there are no indicia of duress. The variety of circumstances that can accompany the fact of custody counsel against a *per se* rule. The courts should look to the circumstances present during the custody and inquire

whether those circumstances demonstrate coercion or duress.

Within this framework, it is irrelevant whether the arrest was proper or improper. Considerations of "fruit of the poisonous tree" aside, the legality or illegality of an arrest usually does not enter the consciousness of either the suspect or the officers. And, if the suspect does not know of the circumstances that will cause a court to hold at some time in the future that his arrest was improper, then he cannot be influenced by those considerations, and they cannot subject him to duress or coercion.

In this case respondent did not know that probable cause to arrest him had arisen six days previously. He did not know that the officers had not obtained a warrant during the interval, and neither he nor the officers could have known that the court of appeals would subsequently hold that a warrant was required. Consequently, respondent's consent must be evaluated as if he had been under a proper arrest. When those standards are applied, there are no grounds upon which to assail his consent. Respondent was familiar with his rights and was personally acquainted with the arresting officer. The discussion preceding the search was brief and friendly, and respondent cooperated in the search by providing the car keys. Respondent had received *Miranda* warnings, and therefore knew that he could refuse consent by standing silent. Even after he gave his consent, the arresting officer allowed him an opportunity to reconsider his decision and warned him that any evidence found would be used against him. The record is devoid of

evidence suggesting that respondent was coerced into extending his consent. The consent was therefore effective, and the credit cards found in the search were properly admitted into evidence.

ARGUMENT

The ultimate holding of the court of appeals in this case was that respondent's convictions had to be reversed because the two credit cards seized from under the floor mat of his automobile were the product of an illegal search and should have been suppressed. The search was illegal because conducted upon the authority of a consent that the court considered to have been invalid. The consent was invalid, in the court's view, because given while respondent was under illegal arrest. The arrest was illegal, said the court of appeals, because made without a warrant although there had been sufficient opportunity to procure one following the acquisition of initial probable cause six days prior to the arrest.

We submit that the conclusion of the court of appeals was erroneous. The failure of any step in the chain of reasoning the court used would suffice to undermine its decision; as we now show, each step was faulty. In the argument that follows, we first consider, as did the court of appeals, the question of the legality of the warrantless, probable cause arrest of respondent. Having argued in Part I that the arrest was lawful, we contend in Part II that, regardless of the legality of the arrest, respondent could and did validly consent to the search of his automobile. The seizure of the stolen credit cards found during that

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search therefore was proper, and the cards were admissible in evidence against him at his trial.

I. NO WARRANT IS NECESSARY TO MAKE A PROBABLE CAUSE ARREST IN A PUBLIC PLACE

A. PROBABLE CAUSE SATISFIES THE FOURTH AMENDMENT'S REQUIREMENT OF REASONABLENESS

An officer making an arrest, and a court considering the propriety of that arrest, must balance several important interests. On the one hand, the individual has an interest in the preservation of his liberty, and particularly in remaining free from restraint that ultimately proves to have been unnecessary. On the other hand, society has a pressing interest in the apprehension of individuals who have committed crimes, so that they may be brought to justice.

Historically, this conflict of interests has been mediated by the requirement that probable cause support every arrest. This is a stringent requirement. The arresting officers must know of facts and circumstances "sufficient to warrant a prudent man in believing that the [individual] had committed or was committing an offense." *Beck* v. *Ohio,* 379 U.S. 89, 91. Cf. *Locke* v. *United States,* 7 Cranch 339, 348. Adherence to the requirement of probable cause protects the individual's interest in his liberty while allowing society to vindicate its own interests in criminal justice.[4]

[4] We refer here only to full custodial arrests. As *Terry* v. *Ohio*, 392 U.S. 1, established, some investigative detentions have many of the traditional characteristics of an arrest, yet are reasonable under the Fourth Amendment when based upon a founded suspicion not amounting to probable cause. The question of when an "arrest" that must be supported by "probable cause" has occurred can be a vexing one (see, *e.g.*, *United States* v. *Calihan*, C.A. 9, No. 74-2471, decided February 18, 1975), and there may be circumstances in which a brief, investigative "arrest" would be considered reasonable although probable cause is lacking. Here, however, we deal with a full custodial arrest for charging purposes; we agree that such arrests, to be lawful, must be supported by probable cause.

This requirement of probable cause for arrest considerably antedates the Constitution. In English common law, arrests *with* warrants were viewed with considerable suspicion, because a warrant would permit an arrest by an officer unfamiliar with the facts of an offense and thus would enhance the possibility of wrongful arrest. So, too, warrants could be sworn out by a vengeful individual and could be used to enlist a public officer in a private vendetta; warrants could be used to vex an enemy while insulating the accuser from liability for false arrest or false imprisonment.[5]

Under the common law, an arrest without a warrant was permissible whenever an officer (or a private individual) had a "reasonable suspicion" that a per-

[5] See 1 Chitty, *Criminal Law* 32, 53–54 (5th ed. 1847). Coke contended that only a person "that knoweth or hath suspicion of the felony" could make an arrest, and that a justice of the peace could not, by issuing a warrant, transfer this power of arrest to a stranger to the crime. Coke, *Fourth Institute of the Laws of England* 177 (1797). See also Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 Sup. Ct. Rev. 46, 50; 10 Halsbury, *Laws of England* 342–351 (3d ed. 1955). Telford Taylor, referring to our own Constitution, has written in a similar vein: "* * * [O]ur constitutional fathers were not concerned about warrantless searches, but about overreaching warrants. It is perhaps too much to say that they feared the warrant more than the search, but it is plain enough that the warrant was the prime object of their concern." Taylor, *Two Studies in Constitutional Interpretation* 41 (1969).

son had committed a felony. 2 Hale, *Pleas of the Crown* 75–84 (1st Am. ed. 1847). The phrases "probable cause" and "reasonable grounds" have also been employed to describe the basis for a lawful arrest. The three terms appear to be interchangeable for this purpose. The common law's accommodation of the conflicting interests has survived the test of time. Every State allows warrantless felony arrests to be made on probable cause or its equivalent; numerous federal statutes expressly provide for such arrests; and the American Law Institute's *Model Code of Pre-Arraignment Procedure* § 120.1 (Official Draft No. 1, 1972) adheres to the same rule. We have collected the state and federal rules in the appendix to this brief (pp. 40–47, *infra*).[6]

With specific reference to the arrest of respondent, we note that Congress has provided in 18 U.S.C. 3061 that an employee of the Postal Service may arrest without warrant for a felony if he has "reasonable grounds to believe that the person to be arrested has committed or is committing such a felony." This grant has been confirmed by the regulations of the Postal Service, 39 C.F.R. 232.5(a)(3); it authorized Inspector Barbarick's apprehension of respondent.[7]

This Court too has concluded that a warrantless

[6] The most comprehensive discussion of the common law of arrest is Wilgus, *Arrest Without A Warrant*, 22 Mich. L. Rev. 541, 673, 798 (1924) (see especially pages 684–689).

[7] 18 U.S.C. 3061 has been upheld by implication in *United States* v. *Gibson*, 462 F. 2d 400 (C.A. 5), and *Ray* v. *United States*, 412 F. 2d 1052 (C.A. 9). Section 3061 was enacted in 1970 because the courts of appeals were divided on whether its predecessor (39 U.S.C. (1964 ed.) 3523(a)(2)(K)) authorized warrantless arrests. Compare *Alexander* v. *United States*, 390 F. 2d 101 (C.A. 5) (no); with *Neggo* v. *United States*, 390 F. 2d 609 (C.A. 9), and *United States* v. *Alexander*, 415 F. 2d 1352 (C.A. 7) (yes).

arrest is reasonable within the meaning of the Fourth Amendment if it is supported by probable cause. It stated in *Carroll* v. *United States*, 267 U.S. 132, 156–157:

> * * * [A] police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and * * * he may only arrest without a warrant one guilty of a misdemeanor if committed in his presence.

Since *Carroll*, this Court repeatedly and without deviation has upheld warrantless arrests on probable cause.[8] One of those cases, *Henry* v. *United States*, 361 U.S. 98, involved 18 U.S.C. 3052, a statute authorizing (in words identical to those in Section 3061) agents of the Federal Bureau of Investigation to make warrantless arrests. The Court, speaking through Mr. Justice Douglas, held that the statute "states the constitutional standard" (361 U.S. at 100).

The majority of the court below concluded, however, that the authority of this body of precedent has been terminated by the plurality opinion in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 476–481. The majority held that because Inspector Barbarick had not obtained a warrant, and because the government had not demonstrated exigent circumstances justifying an

[8] See, *e.g.*, *Cupp* v. *Murphy*, 412 U.S. 291, 294–295; *Beck* v. *Ohio*, *supra*; *Wong Sun* v. *United States*, 371 U.S. 471, 479–480 (standards for assessing probable cause may be more stringent if no warrant is obtained); *Draper* v. *United States*, 358 U.S. 307; *United States* v. *Rabinowitz*, 339 U.S. 56, 60; *Brinegar* v. *United States*, 338 U.S. 160, 175–176; *Trupiano* v. *United States*, 334 U.S. 699, 705. Some of these cases involve situations like the instant one, in which there would have been ample time to obtain a warrant.

arrest without a warrant, the arrest was unconstitutional (Pet. App. 5A–6A). We disagreed with this analysis in our petition for certiorari (Pet. 7–8) but conceded that *Coolidge* had produced some uncertainty in what previously had been a settled area of law. Since we filed our petition, this Court has clarified the boundary of the area of uncertainty.

We contended in our petition (Pet. 7–9) that the pertinent portion of the discussion in *Coolidge* was concerned only with arrests that take place in private homes; such arrests involve not only a deprivation of liberty but also an invasion into an area of privacy protected by the Constitution. But in this case the arrest took place in a public restaurant where the officers, even without a warrant or probable cause to arrest, had every right to be. The correctness of our analysis would now seem apparent from the treatment of the subject in *Gerstein* v. *Pugh*, No. 73–477, decided February 18, 1975, in which the Court observed that probable cause arrests have never been invalidated solely because officers failed to obtain a warrant and implied in the plainest terms that the issue of warrantless arrest remains unsettled only to the extent that it involves entry into a home (or other private place) to make an arrest. Slip op. 9–10 and n. 13. Because the arrest in this case occurred in a public rather than in a private place, *Coolidge* does not affect it.[9]

[9] We have no occasion in this brief to discuss the propriety of the issue left open in *Coolidge* and *Gerstein*—the entry into a private place to make a warrantless arrest.

B. AN ARREST WARRANT IS NOT CONSTITUTIONALLY REQUIRED SIMPLY BECAUSE THERE IS OPPORTUNITY TO OBTAIN ONE

The Court's reaffirmance in *Gerstein* of the traditional and virtually universal (see Appendix, *infra*) Anglo-American doctrine that warrantless felony arrests are lawful if predicated on probable cause does not reasonably admit of an exception for cases in which there was opportunity to procure a warrant. In the absence of adequate time to obtain a warrant, the emergency exception to the requirement of search warrants would permit even a warrantless, probable cause search, so the discussion of arrests in *Gerstein* (and the authorities on which it relied) logically must have been intended to cover the non-emergency situation, in which there is adequate time to obtain a warrant. However, since *Gerstein* contained no explicit, independent discussion of the distinction that theoretically could be drawn between emergency and non-emergency situations, we now turn to the question whether the arrest in this case was improper because Inspector Barbarick could have obtained a warrant during the six days between the time Khoury provided him with the initial credit card and the meeting at the restaurant.[10]

[10] Even if warrants ordinarily should be obtained in non-emergency situations, there is an independent and reversible error in the reasoning of the court of appeals. Respondent's possession of additional stolen credit cards was a separate offense as to which the agents acquired probable cause only at the time Khoury gave the prearranged signal at the restaurant. Accordingly, even if the officers could not lawfully have arrested respondent on the charge of theft of the credit card that Khoury had turned over to Barbarick six days earlier, there

Presumably, the argument that warrantless probable cause arrests are unlawful when there has been opportunity to obtain a warrant must seek its theoretical basis in an analogy to the principles regarding the need for warrants in conducting searches. However, the analogy fails for historical, logical, and practical reasons. The first of these alone would suffice to support the lawfulness of the arrest in the present case. Courts and legislatures have for centuries and with great uniformity drawn the distinction between arrests and searches when considering the need for warrants. It is thus likely that this Court is "foreclosed by principles of *stare decisis* from further examination into history and practice" (*United States* v. *Robinson,* 414 U.S. 218, 230), but even if it is not, *Robinson* teaches that great weight must be given the historical understanding in such matters. The historical support for the validity of warrantless arrests far

was a valid ground to arrest for the later offense. (Surely, for example, the prior failure to procure a warrant could not have rendered the officers powerless to arrest respondent had they acquired probable cause to believe he was in possession of drugs or counterfeit currency. No more should they have been powerless to arrest for a different theft of mail by respondent.)

Although Inspector Barbarick testified that the arrest was being made for the earlier theft (A. 23), which perhaps explains why the court of appeals did not recognize this alternative basis for sustaining the legality of the arrest, we do not believe that the subjective intentions of the arresting officers are controlling. There was fresh probable cause relating to an independent offense and no prior opportunity to obtain an arrest warrant for that offense; accordingly, even were the court of appeals correct in concluding that an arrest based on "old" probable cause is unlawful without a warrant, its belief should not have been accorded controlling effect in the present case.

exceeds that establishing the broad scope of search of the person incident to arrest that was at issue in *Robinson.*[11]

Moreover, even were the Court writing on a clean slate, there are sound conceptual bases for the distinction between searches and arrests. As is apparent from the plain view exception to the warrant requirement, it is not the act of seizure itself (whether of property or of the person), but rather the invasion of a constitutionally protected zone of privacy, that requires antecedent magisterial evaluation. Had the stolen credit cards been in plain view on the restaurant table, they could have been seized without a warrant even had there been prior opportunity to obtain one. Since no search was required to ascertain respondent's whereabouts, and because the agents did not invade a zone of privacy in the public restaurant, the seizure of his person through arrest was lawful if supported by probable cause.

There is another important distinction between the seizure of a person (by arrest) and the search for and seizure of property. Although a return must be made on a search warrant, property seized in a warrantless search is not promptly accounted for to a judicial officer, nor is the propriety of the seizure evaluated in any manner by such an officer, unless and until the person from whom the property was seized moves for the suppression or return of the property.

[11] The Court followed a similar course in *Gerstein*, relying upon historical practice in support of its conclusion that an arrest followed by an informal inquiry into probable cause satisfies the constitutional requirement of reasonableness.

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By contrast, an arrested person must be taken promptly before a magistrate and a sworn complaint or verified information filed establishing at least *prima facie* justification for his continued detention. This complaint or information is, in turn, subject to prompt review in an informal determination of probable cause (*Gerstein, supra*). An arrest without a warrant is, therefore, subject to prompt judicial scrutiny that is not afforded in the case of warrantless searches and seizures. Because of this important difference—justified by the effect of arrest on the individual's interest in his own liberty and privacy [12]—searches and seizures of property cannot properly be analogized to arrests. The availability of prompt post-arrest review by a judicial officer diminishes the need for pre-arrest evaluation by a neutral and detached magistrate that is perceived in the case of a search (see pages 25–26, *infra*).

Apart from historical, theoretical, and structural distinctions, the creation of a warrant requirement for arrests in public places would not be of significant practical utility in striking a fair balance between the legitimate interests of the individual in being free of unjustified arrest, on the one hand, and the legitimate needs of law enforcement on the other.

A requirement that a warrant for arrest be obtained as soon as public officials have accumulated probable cause to arrest would put an unnecessary and unfortunate premium upon haste in law enforcement and would create a substantial incentive to ter-

[12] See *Robinson*, *supra*, 414 U.S. at 237–238 (Powell, J., concurring).

minate an investigation prematurely. Even after they have probable cause to arrest, officers often attempt to obtain additional evidence, as they did here. This serves at least two valuable purposes. First, evidence that constitutes probable cause to arrest often is not sufficiently weighty to establish guilt beyond a reasonable doubt. If officials terminate their investigation, obtain a warrant, and arrest a suspect as soon as they have probable cause to do so, many guilty individuals would go free because there would be insufficient evidence to convict. Indeed, in this case the jury acquitted respondent on the count charging him with possession of the card he gave to Khoury, although it was his probable felonious possession of that card that the court of appeals believed established probable cause to arrest him.

The second purpose is closely related and also is illustrated by this case. Because probable cause is established when there exists a reasonable and supported suspicion of crime that may fall far short of certainty, often there will be probable cause to arrest innocent individuals. A continued investigation (rather than an immediate arrest) may vindicate such suspects and avoid unnecessary disruption of their lives. Inspector Barbarick responsibly continued his investigation; even though Khoury was apparently reliable and had provided corroboration of his story, he was not absolutely trustworthy. Informers who are reliable in many instances may nevertheless be mendacious or simply misinformed in a particular case. By continuing the investigation, Inspector Barbarick was able to minimize the risk that respondent

would be arrested for a crime he had not committed.

A rule that an agent must secure a warrant as soon as he has obtained probable cause would expose officials to the dilemma rejected—in the Sixth Amendment context—in *Hoffa* v. *United States,* 385 U.S. 293, 310. Police would be required at their peril to ascertain the exact moment that the courts will later hold that they acquired probable cause to arrest, and thereupon to secure a warrant without delay. If they fail to recognize that they had probable cause, but rely upon other indicia of guilt (such as Khoury's signal at the restaurant), they risk suppression of their later discoveries. On the other hand, if the officers obtain a warrant but delay execution in order to gather additional evidence, they may be criticized for deliberately postponing execution for the purpose of "prejudicing" a defendant. See, *e.g., Godfrey* v. *United States,* 358 F. 2d 850 (C.A.D.C.).

Furthermore, the longer the officers postpone arrest while continuing an investigation, the less useful a warrant would become as a shield against unjustified or unreasonable behavior. If the arrest is substantially delayed, the officers will have opportunity for reflection whether or not they possess a warrant. As additional evidence is gathered during the investigation, the initial grounds for issuance of the warrant may either be discredited or supplanted by other and more persuasive grounds that support the arrest.[13] Under the decision below, the officers risked a viola-

[13] Khoury's signal at the scene of the arrest would by itself have furnished probable cause to arrest respondent, and it strongly reinforced the preexisting probable cause.

tion of the Fourth Amendment if they waited too long and a violation of the Fourth Amendment if they acted too soon. Yet at the same time the rule would provide little, if any, meaningful protection to individual interests.[14]

Even if a warrant requirement would be advantageous to the individual, however, it is not constitutionally required. Although "[m]aximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest, * * * such a requirement would constitute an intolerable handicap for legitimate law enforcement." *Gerstein, supra, slip op.* at 9. Under the Fourth Amendment, "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest." *Id.* at 10. Once the individual has been arrested without a warrant, he is (in the federal system) promptly brought before a magistrate (Fed. R. Crim. P. 5(a)) and, within a few days, afforded a preliminary examination inquiring into probable cause (Fed. R. Crim. P. 5.1). This sequence of arrest with probable cause, followed by judicial appearance and inquiry, is more than adequate to satisfy

[14] An ironic result of the reasoning of the majority below is that police may be best off should the magistrate decline to issue a warrant when first approached. The officers then would be free to continue their investigation. As in the instant case, they could arrange to gather additional evidence and then arrest, on the spot, on the basis of this new evidence plus exigent circumstances. For example, it could be argued that such circumstances were present here; had respondent left the restaurant without being arrested, he could have secreted the credit cards or even escaped entirely.

the reasonableness requirement of the Fourth Amendment. As the Court concluded in *Gerstein, supra,* slip op. at 12, "there are indications that the Framers of the Bill of Rights regarded [a less strigent procedure] as a model for 'reasonable' seizure." In sum, there is neither logical justification nor historical support for a rule that would require officials to obtain a warrant in order to make a probable cause arrest in a public place.[15]

[15] Although the Constitution does not make a warrant a prerequisite to a valid arrest, there are nevertheless substantial incentives for officers to obtain warrants. When the existence of probable cause is open to reasonable question, officers will be induced to seek a warrant because of this Court's indication (see *Wong Sun, supra,* 371 U.S. at 479–480) that the propriety of the arrest will be more favorably assessed if the officers' belief that they possessed probable cause has been supported by a detached judicial officer. See also *United States* v. *Ventresca,* 380 U.S. 102, 106; *Aguilar* v. *Texas,* 378 U.S. 108, 111. Similarly, when the existence of probable cause is in doubt, it will be advantageous for officers to submit their evidence to a magistrate in advance because, if probable cause is lacking, the magistrate may so inform them. They then will be able to refrain from making an improper arrest that results in suppression of their discoveries and the inability to prosecute those guilty of crime. In short, whenever the existence of probable cause is a close question, officers will tend to seek warrants, for they stand to gain whether a warrant is issued or refused. In other cases—where the existence of probable cause to arrest is obvious—the need to submit the evidence in advance of arrest is correspondingly diminished (from the point of view of both public officials and suspects), because the interposition of the judgment of a detached judicial officer will "protect" a suspect against improper arrest only when the existence of probable cause is a close question.

Because of the substantial incentives to obtain a warrant in close cases, it is the standard practice of the Federal Bureau of Investigation to present its evidence to the United States Attorney, and to obtain a warrant, before making an arrest.

II. RESPONDENT EFFECTIVELY CONSENTED TO THE SEARCH OF HIS AUTOMOBILE, REGARDLESS OF THE LEGALITY OF HIS ARREST

A. A CONSENT TO SEARCH IS EFFECTIVE UNLESS IT IS THE PRODUCT OF DURESS OR COERCION

The Fourth Amendment secures the people against unreasonable searches and seizures and thereby protects legitimate expectations of privacy in both their possessions and their personal lives. *Katz* v. *United States,* 389 U.S. 347. But while the Amendment protects an individual against forceful or surreptitious intrusions, if unreasonable, it does not prohibit public officials from going where they have been invited. Cf. *Lewis* v. *United States,* 385 U.S. 206. The scope of the individual's legitimate expectations of privacy is defined not only by the structure of the society in which we live but also by the individual's own desire to shield his possessions or activities from inspection. If one does not desire to exclude strangers from his property—that is, if he consents to a search—he has diminished to that extent the area of privacy within which the Fourth Amendment protects him.

It is not constitutionally unreasonable for officers to seek consent; any individual may ask another for permission to use or inspect the latter's possessions. Nor is it constitutionally unreasonable for an officer to proceed upon such consent once it is given. Indeed, seeking such consent should be a preferred course for law enforcement officers, because it is more respectful of the desires and privacy of the individual than are the alternatives, such as warrants, that call upon the

force of the state to overcome the resistance of a citizen. When an officer is proceeding by consent, he invades no area that the citizen desires to keep hidden from view.

Moreover, consent can be a valuable device in any investigation into crime, for it permits an officer to inspect areas that otherwise would be closed because he lacks probable cause. Such searches by consent may disclose valuable evidence; they also may reveal information that leads officers to abandon an investigation and spare a suspect the use of more intrusive techniques that otherwise might have been both necessary and justified.

Accordingly, this Court has on many occasions approved and encouraged law enforcement officials to rely upon searches by consent.[16] Two terms ago, in *Schneckloth* v. *Bustamonte, supra,* the Court considered for the first time the standards by which the effectiveness of a consent would be judged.

In *Schneckloth,* a car was lawfully stopped by officers while traveling on a highway. Although there was probable cause to arrest the driver for traffic violations, the officers did not do so. In a brief but friendly exchange that followed, consent was given to a search of the car. The search produced evidence leading to Bustamonte's conviction. He contended that the search was unconstitutional because the occupants of the car had not been warned that they could refuse to consent to a search. The Court rejected that contention and

[16] See, *e.g., Katz, supra,* 389 U.S. at 358, n. 22; *Vale* v. *Louisiana,* 399 U.S. 30, 35; *Davis* v. *United States,* 328 U.S. 582, 593–594; *Zap* v. *United States,* 328 U.S. 624, 630; *Bumper* v. *North Carolina,* 391 U.S. 543.

instead held that a consent is effective unless the "defendant's will [is] overborne in a particular case" (*Schneckloth, supra,* 412 U.S. at 226).

The Court's analysis demonstrated that a challenge to the effectiveness of a consent is not to be evaluated primarily by the particular warnings that the officers may have given in procuring the consent, or by establishing the existence of a knowing and deliberate "waiver" of the right to preclude a search. This is so because, as the Court recognized, there is an important difference between the "waiver" of rights that secure the accused a fair trial and a consent allowing a stranger to inspect one's property (*id.* at 241–243). A consent to search does not surrender a right vital to the ascertainment of truth in criminal proceedings, but instead relinquishes a portion of the zone of privacy that the individual otherwise might shield from official intrusion. Only after the individual has marked off the extent of privacy he desires (or will insist upon) is it meaningful to inquire whether there has been an unreasonable invasion of that zone. Consequently, the effectiveness of a consent is to be judged by whether the individual's actions establishing the zone of privacy for which he demands respect are the result of his free will, or whether that will has been overborne by official action.

This inquiry requires a court to ascertain whether the "consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied," which, in turn, requires an assessment of "the totality of all the circumstances" that might be relevant to the individual's decision (*id.* at 227). Each influence

that might overbear the suspect's will must be considered, for if the individual has been improperly induced to constrict the zone of privacy from which he will exclude strangers, then the officials have behaved unreasonably under the Fourth Amendment. But if, on the other hand, this examination of all factors, not giving controlling weight to any of them, discloses that the individual's choice was his own, the officials are entitled to act in accordance with the consent.

In the instant case the majority below paid only lip service to the standards enunciated in *Schneckloth*. We submit that the record contains overwhelming evidence that respondent fully understood his rights and voluntarily agreed to the search of his car. The essential facts are undisputed. Immediately after his arrest, respondent was given *Miranda* warnings. As a result of these warnings respondent knew that he had no obligation to converse further with the arresting officers and that he had every right to respond with silence to Inspector Barbarick's request to search the car. Respondent was not a neophyte at these procedures; he had been arrested before and had also served as an informant for Inspector Barbarick, with whom he was on a first-name basis. There was no animosity at the time of the arrest.

Respondent was familiar with his constitutional rights, including the right not to speak to the officers, and at one point after his arrest even suggested to Inspector Barbarick that he not bother to explain these rights again (A. 48–49). Although he was in

custody when he gave his consent, it was not in a stationhouse atmosphere, nor was there extended questioning. Respondent consented immediately upon being asked and voluntarily gave Inspector Barbarick the keys to his car. After he gave his initial consent, respondent was informed that anything that was found would be used against him. This warning included within it the implicit advice that consent need not be extended. But respondent immediately reaffirmed his consent, with the remark that there was nothing in the car. We submit that if respondent's consent under these circumstances was not effective, then the vast majority of consents upon which officers rely in their daily work are invalid.

The court of appeals stated that two factors indicated coercion: first, that respondent had not been advised of his right to withhold consent; and second, that respondent was in custody in violation of the Fourth Amendment (Pet. App. 6A–7A). The first of these factors was involved in *Schneckloth* itself, and the Court held that failure to inform an individual that he could withhold consent was not fatal. Moreover, while one ignorant of his right to withhold consent could nevertheless validly give consent, it is also apparent from *Schneckloth* that knowledge of the right to withhold consent—whether derived from an express warning or otherwise—will result in an effective consent. The record in this case supports an inference that respondent knew that he could withhold consent. This advice is fairly implicit in the *Miranda*

warnings given to respondent [17] and also is implicit in Inspector Barbarick's warning, after respondent's first consent, that he should reconsider because anything found in the car could be used against him. If respondent in fact knew that he had a right to withhold consent, then the Inspector's failure to warn him explicitly could not possibly have coerced him.

We turn, then, to the majority's second ground—that coercion is shown because respondent was "in custody in violation of the Fourth Amendment, since the agents had failed to obtain an arrest warrant" (Pet. App. 7A). As we argue below, neither the fact of custody, nor any illegality of that custody, establishes coercion or duress sufficient to invalidate the consent.

B. CUSTODY IS SIMPLY ONE FACTOR TO BE CONSIDERED IN ASCERTAINING WHETHER THERE WAS COERCION OR DURESS

The consent with which the Court dealt in *Schneckloth* was given before anyone was taken into custody, and the Court remarked upon this factor several times (412 U.S. at 221, 240–241, n. 29, 247, 248). Respondent has contended, in his brief in opposition to certiorari, that consents given while in cus-

[17] All courts of appeals that have considered the matter—including the Ninth Circuit—have concluded that advice that an individual need not consent to a search, and can withhold consent by remaining silent, is implicit in the *Miranda* warning. See, *e.g.*, *United States* v. *Heimforth*, 493 F. 2d 970 (C.A. 9), certiorari denied, 416 U.S. 908; *United States* v. *Jones*, 475 F. 2d 723 (C.A. 5); *White* v. *United States*, 444 F. 2d 724 (C.A. 10); *United States* v. *Goosbey*, 419 F. 2d 818 (C.A. 6); *Government of the Virgin Islands* v. *Berne*, 412 F. 2d 1055 (C.A. 3), certiorari denied, 396 U.S. 837; *Gorman* v. *United States*, 380 F. 2d 158 (C.A. 1).

tody should be held ineffective *per se* (Memo. in Opp. at 9–11). But no court has accepted that view, and we submit that, although custody is one factor that must be considered in determining whether there was coercion or duress, it is not necessarily determinative.[18]

Most of the cases to which the Court referred in *Schneckloth* to establish the standard for identifying duress or coercion were cases involving custodial interrogation. "In all of these cases, the Court determined the factual circumstances surrounding the confession, assessed the psychological impact on the accused, and evaluated the legal significance of how the accused reacted." 412 U.S. at 226. The Court then held that it would apply to consent search cases a standard similar to that previously used to determine whether a confession had been coerced. Accordingly, as in the confession cases, the presence or absence of custody, and the length and conditions of that custody prior to the confession or consent, are simply factors

[18] In three cases, including two decided subsequent to the decision in the instant case, the Ninth Circuit has held that custody is simply one factor to be considered under the standards of *Schneckloth*. See *United States* v. *Townsend*, 510 F. 2d 1145 (C.A. 9); *United States* v. *Heimforth*, *supra*; *United States* v. *Rothman*, 492 F. 2d 1260, 1263–1264 (C.A. 9). Every other court to consider the question has come to the same conclusion. See *United States* v. *Miley*, C.A. 2, No. 74–2207, decided March 19, 1975 (slip op. 2378); *United States* v. *Campbell*, C.A. 4, No. 74–1843, decided February 19, 1975 (slip op. 6) (reported without opinion at 510 F. 2d 967); *Weeks* v. *Estelle*, 509 F. 2d 760, 766 (C.A. 5); *United States* v. *Garcia*, 496 F. 2d 670, 673–674 (C.A. 5); *United States* v. *Horton*, 488 F. 2d 374 (C.A. 5); *United States* v. *Legato*, 480 F. 2d 408 (C.A. 5).

(albeit important ones) to be considered. No one factor is determinative.

Many distinct types of situations are comprehended within the term "arrest" and "custody." They may include, as they did here, the apprehension and detention of a suspect without confinement or lengthy interrogation. The suspect and the officers may know each other, and subsequent conversation may be congenial and free-flowing. In such circumstances the mere fact of custody does not carry with it indicia of coercion—there was here no "force, threats, [or] intimidation" (*Weeks* v. *Estelle,* 509 F. 2d 760, 766 (C.A. 5)). On the other hand, custody may be lengthy and unfriendly; the accused may be held and subjected in a confined stationhouse atmosphere to repeated questioning and may grudgingly yield his "consent" only after repeated refusals. In the latter case a court reasonably might find coercion or duress arising out of the custody. But the evidence that might establish coercion or duress does not come from the mere fact of custody. It flows, instead, from the attributes of that custody in the particular case and the effect those attributes had on the suspect who challenges the voluntariness of his consent.

The diversity of circumstances that may accompany an arrest counsels against a *per se* rule that a person in custody cannot give a consent to search, just as it has counseled against a *per se* rule that a person in custody cannot confess to crime. In either case, coercion or duress must be established on the particular facts of the case.

In many ways, indeed, the fact of arrest may tend to persuade a suspect to withhold consent rather than to grant it. If an individual knows he is suspected of crime but has not yet been arrested, he may often be tempted to "consent" to a search in the hope that, either because the officers will search poorly or because the evidence is well hidden, the search will reveal nothing and the suspicion will be dispelled. On the other hand, a suspect under arrest would understand that there is much less chance that he will be released if a search yields no new evidence; therefore, there is less inducement to consent. Moreover, a suspect under arrest almost invariably will be given *Miranda* warnings, and these warnings carry with them the implicit advice that, by remaining silent, the suspect can withhold consent.[19] An individual not yet under arrest does not receive these warnings and therefore is less likely to appreciate that he can withhold consent.

C. THE FACT THAT A PARTICULAR ARREST MAY BE UNCONSTITUTIONAL DOES NOT AFFECT THE *SCHNECKLOTH* STANDARDS

If, as we have argued above, the effectiveness of a consent given by one in custody is to be judged under the *Schneckloth* standards, then it follows directly that an individual in unconstitutional custody can consent to a search.[20] The consent is effective

[19] See cases cited at note 17, *supra.*

[20] While the discussion of this matter by the court of appeals is framed entirely in terms of measurement of the validity of respondent's consent on the basis of its voluntariness, it could be argued that a consent that is voluntary under *Schneckloth* standards is nevertheless ineffective when it is the "fruit"

unless it was induced by duress or coercion, and the presence of duress or coercion must be assessed in

of an illegal arrest. The alleged invalidity of an arrest would, of course, be relevant to such a contention, which is similar to the issue before the Court in *Brown* v. *Illinois*, No. 73–6650, argued March 18, 1975, in which the question presented concerns the admissibility of a confession made during a period of apparently unconstitutional detention.

The distinction between a voluntariness analysis and a "fruits" analysis will often be one of surpassing subtlety, since custody is a circumstance the effects of which must be weighed, and the coercive aspects of which assessed and discounted, before a court can conclude that the consent was voluntary. Ordinarily, then, the finding that consent was freely given in a particular case notwithstanding the impact of the custody in which the consenter was held will substantially undermine the causal relationship that is a necessary predicate to the "fruit" finding.

Accordingly, the circumstances in which a "fruits" analysis will produce a different result from the *Schneckloth* voluntariness inquiry are perforce limited. Such a different result would be appropriate, if ever, only in the narrow circumstances in which it is found that the officers have engaged in substantial or intentional unconstitutional behavior for the purpose of securing or inducing the subsequent consent. Cf., *e.g.*, *United States ex rel. Gockley* v. *Myers*, 450 F. 2d 232 (C.A. 3); *United States* v. *Kilgen*, 445 F. 2d 287 (C.A. 5) (by implication); *United States* v. *Edmons*, 432 F. 2d 577 (C.A. 2). In such a situation, but not otherwise, the exclusionary rule could serve its intended function of deterring unconstitutional conduct by the police. There is no evidence in the instant case that the conduct of Inspector Barbarick was intentionally unlawful—far from it. Inspector Barbarick could not have anticipated that the court of appeals would set aside a great body of precedent and require a warrant for a probable cause arrest. Nor is there evidence that the arrest was a pretext used in order to gain the opportunity to induce respondent to consent to a search.

the light of the totality of the circumstances. The "totality of all the circumstances" is not considered in the abstract, as part of a search for circumstances a court might find distasteful for one or another reason. The circumstances are instead to be considered, in their entirety, for evidence that might show that the suspect was subject to coercion or duress. Unless they bear on duress or coercion, the circumstances surrounding the consent are irrelevant.

One of the requisites of duress or coercion, whether express or implied, blatant or subtle, is knowledge of the pertinent circumstance by the person giving consent. Unknown or unknowable factors simply are not relevant under *Schneckloth*, because they can not have influenced the decision to consent. In the instant case, for all respondent knew, his arrest was entirely legitimate. Respondent did not know that Khoury had informed on him six days previously, giving the agents sufficient time to obtain a warrant. Respondent did not know that no warrant had been obtained. Neither he nor the officers knew that the court of appeals would suddenly depart from many years of precedent and require a warrant for his arrest. Because the factors relied upon by the court of appeals to establish the invalidity of respondent's arrest never entered respondent's consciousness, they cannot have affected his decision to consent to a search of his car. Accordingly, they are irrelevant, and his consent should be evaluated as if respondent had been under constitutional arrest. And, as we have demonstrated above, his consent is

effective under the standards properly applied to an individual in custody.[21]

Consideration of extraneous material that does not bear on duress or coercion would seriously deform the *Schneckloth* approach and discourage law enforcement officials from relying on consents, even though procurement of genuine consent is a technique less intrusive than others, including warrants, to which officials would be forced to turn were consents made more complicated to obtain and less reliable once obtained. We submit that respondent willingly consented to a search of his car, and that nothing in the record indicates in any way that he was coerced or was under duress of any kind, express or implied. Accordingly, the consent was effective, and the credit cards found in the search of his car were properly admitted into evidence against him.

[21] Our analysis is consistent with that used in the few other cases that have considered the validity of a consent by an individual under unconstitutional arrest. In *United States* v. *Bazinet*, 462 F. 2d 982, 987 (C.A. 8), the court held that an effective consent could be given, but that the court would subject the consent to strict scrutiny for evidence of coercion. To the same effect is *Phelper* v. *Decker*, 401 F. 2d 232, 237 (C.A. 5) (followed by *United States* v. *Horton*, *supra*, 488 F. 2d at 380, and *Bretti* v. *Wainwright*, 439 F. 2d 1042 (C.A. 5), certiorari denied, 404 U.S. 943). (But cf. *Manning* v. *Jarnigan*, 501 F. 2d 408 (C.A. 6)) *Phelper* held that a consent would be effective if the government could show by clear and convincing evidence that the consent was an act of free will sufficient to break the causal chain beginning with the unconstitutional arrest. To the extent *Phelper*, *Bazinet* and *Manning* support a more restrictive test than the one we have supported in the text, the difference is attributed to "fruit of the poisonous tree" problems. We have discussed these at note 20, *supra*.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
JOHN C. KEENEY,
Acting Assistant Attorney General.
ANDREW L. FREY,
Deputy Solicitor General.
FRANK H. EASTERBROOK,
Assistant to the Solicitor General.
PETER M. SHANNON, JR.,
KENNETH A. HOLLAND,
Attorneys.

APRIL 1975.

APPENDIX

Either by statute or by judicial decision, every State, and the federal government, authorizes arrests for felonies to be made without a warrant if the arrest is supported by probable cause. Our research has not disclosed any state that requires officials to obtain a warrant simply because there is an opportunity to do so.

In addition to 18 U.S.C. 3061, which is discussed in the text, several other federal statutes authorize warrantless arrests: 18 U.S.C. 3052 (Federal Bureau of Investigation); 18 U.S.C. 3056 (Secret Service); 21 U.S.C. 878 (Bureau of Narcotics and Dangerous Drugs, and by substitution the Drug Enforcement Agency); 26 U.S.C. 7607 (Customs Service). Other federal agents also can make warrantless arrests; this Court has held that, when no federal statute authorizes warrantless arrests, officers are entitled to make such arrests if authorized by state law. *United States* v. *Di Re,* 332 U.S. 581, 588–590.

The American Law Institute's *Model Code of Pre-Arraignment Procedure* § 120.1 (Official Draft No. 1, 1972) provides that "[a] law enforcement officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed (a) a felony * * *." The official commentary states: "The Code thus adopts the traditional and almost universal standard for arrest without a warrant" (*id.* at 129). The draftsmen considered imposing a requirement of a warrant if there was time to obtain one, but rejected that possibility because "the need for it is not urgent, and the subsequent inquiry such

a requirement would authorize would be indeterminate and difficult" (*id.* at 142; footnote omitted). See also the American Law Institute's *Code of Criminal Procedure* § 21 (Official Draft 1930).

Most states adhere to the same rule. We list below the states that follow the standard of the common law, as articulated by this Court in *Carroll* v. *United States,* 267 U.S. 132, 156–157.

Alabama—Alabama Code, Tit. 15, § 154 (1959).

Alaska—Alaska Statutes § 12.25.030 (1973) (same standard applies to both peace officers and private persons).

Arizona—Arizona Revised Statutes § 13–1403 (Supp. 1973).

Arkansas—Arkansas Statutes Annotated § 43–403 (1964).

California—West's Annotated California Penal Code § 836 (1970).

Connecticut—Connecticut General Statutes Annotated § 6–49 (1972).

Delaware—Delaware Code Annotated, Tit. 11, § 1904(b) (1975).

District of Columbia—D.C. Code § 23–581(a)(1)(A) (1973).

Florida—West's Florida Statutes Annotated § 901.15 (1973).

Hawaii—Hawaii Revised Statutes, Tit. 37 § 708–5 (1968) (felonies and misdemeanors treated alike).

Idaho—Idaho Code Annotated § 19–603 (1948).

Illinois—Illinois Annotated Statutes, ch. 38, § 107–2(c) (Smith-Hurd 1970) (felonies and misdemeanors treated alike).

Iowa—Iowa Code Annotated § 755.4 (1950).

Kansas—Kansas Statutes Annotated § 13–623 (1964).

Kentucky—Kentucky Revised Statutes Annotated § 431.005(1) (1969).

Louisiana—Louisiana Criminal Procedure Code Annotated, Art. 213 (West 1967).

Maryland—Maryland Annotated Code, Art. 27, § 594B (1971).

Michigan—Michigan Statutes Annotated § 28.874 (1972).

Minnesota—Minnesota Statutes Annotated § 629.34 (1947).

Mississippi—Mississippi Code Annotated § 99–3–7 (1973).

Nebraska—Nebraska Revised Statutes § 29–404.02 (Cum. Supp. 1969).

Nevada—Nevada Revised Statutes § 171.124 (1973).

New Hampshire—New Hampshire Revised Statutes Annotated § 594.10 (1974).

New Jersey—New Jersey Statutes Annotated §§ 40:174–103, 40:174–166, 40:174–196 (1967).

New York—New York Criminal Procedure Law § 140.10 (McKinney 1971).

North Dakota—North Dakota Century Code Annotated § 29–06–15 (1974).

Ohio—Ohio Revised Code Annotated § 2935.04 (Anderson 1954) (warrant must be obtained as soon as possible after arrest).

Oklahoma—Oklahoma Statutes Annotated, Tit. 22, § 196 (1969).

Oregon—Oregon Revised Statutes § 133.310 (1971–1972).

Rhode Island—Rhode Island General Laws Annotated § 12–7–4 (1970).

South Carolina—South Carolina Code Annotated § 17–251 (1962) (see also *Bushardt* v. *United*

Inv. Co., 121 S.C. 324, which explains that the power to arrest without warrant is not limited to instances enumerated in the statute).

South Dakota—South Dakota Com. Laws Annotated § 23–22–7 (1969).

Tennessee—Tennessee Code Annotated § 40–803 (1955).

Utah—Utah Code Annotated § 77–13–3 (Supp. 1973).

Vermont—Vermont Code of Criminal Procedure Rule 3(a) (1974).

Virginia—Virginia Code Annotated § 19.1–100 (Com. Supp. 1974) (see also *Crowder* v. *Commonwealth,* 213 Va. 151).

Washington—see *State* v. *Kohler,* 70 Wash. 599.

West Virginia—see *Hill* v. *Smith,* 107 Va. 848; *State* v. *Hammond,* 96 W. Va. 96; *State* v. *Brown,* 101 W. Va. 160.

Wisconsin—West's Wisconsin Statutes Annotated § 968.07 (1971).

Wyoming—Wyoming Statutes Annotated § 7–155 (1959) (arrest may be made without warrant, but detention cannot exceed time necessary to obtain post-arrest warrant).

Several states deviate from this model, but in all of them provisions are made for warrantless arrests.

Colorado—Colorado Revised Statutes § 16–3–102 (1974) provides that a warrant should be obtained "when practicable." This provision is apparently hortatory rather than directory, and arrests without warrant are upheld. See *Van Camp* v. *Gray,* 440 F. 2d 777 (C.A. 10). See generally Note, *The Evolution of the Police Officer's Right to Arrest Without a Warrant in Colorado,* 43 Denver L. J. 366 (1966).

Georgia—Georgia apparently permits arrests on warrants on less than probable cause (Georgia Code Annotated § 27–103 (1972)). Another statute (Georgia Code Annotated § 27–207 (1972)) also provides that an arrest may be made without warrant only if the offense is committed in the officer's presence, the offender is trying to escape, or "other cause" might produce a failure of justice if a warrant were sought. This section has been strictly construed as to misdemeanors. See *Thomas* v. *State,* 91 Ga. 204; *Yancey* v. *Fidelity & Casualty Co. of New York,* 96 Ga. App. 476. But see *Yates* v. *State,* 127 Ga. 813 (four month delay in making misdemeanor arrest without a warrant does not invalidate the arrest). We are not aware of any case, however, in which a felony arrest on probable cause has been declared improper under Section 27–207.

Indiana—Indiana Annotated Statutes § 9–1024 (1956) provides that if an arrest is made without a warrant, the suspect can be held only until a warrant is obtained. State case law has adopted the common law rule for warrantless arrests, however. See *Doering* v. *State,* 49 Ind. 56; *Hanger* v. *State,* 199 Ind. 727.

Maine—Maine Revised Statutes Annotated, Tit. 15, § 704 (1965) states that officers may arrest without a warrant, but must obtain one following the arrest. This procedure replaces Maine's common law rule that after a warrantless arrest the suspect was to be taken before a magistrate for a hearing on probable cause. See *Burke* v. *Bell,* 36 Me. 317.

Massachusetts—Massachusetts Annotated Laws, ch. 41, § 98 (1973) authorizes peace officers to make arrests but does not mention warrants. The Supreme Judicial Court has held that arrest with-

out a warrant is permissible if supported by probable cause. *Commonwealth* v. *Lawton,* 348 Mass. 129. Many Massachusetts statutes, however, grant express power to make warrantless arrests. See, *e.g.,* Ch. 166, § 42B (1974) (wire fraud); Ch. 266, § 102B (1974) (possession of Molotov cocktails); Ch. 271, § 10 (1968) (gambling).

Missouri—Under Missouri Annotated Statutes § 544.170 (1953), a suspect detained on warrantless arrest must be released unless a warrant is obtained within 20 hours. Cf. § 544.120. No statute creates a power to make warrantless arrests, but such power has been recognized judicially. See *State* v. *Padgett,* 316 Mo. 179; *State* v. *Hall,* 312 Mo. 425. Cf. Comments, *When Is an Arrest Warrant Required?,* 8 St. Louis L. J. 415 (1964); Scurlock, *Arrest Without Warrant,* 29 Kansas City L. Rev. 163 (1961).

Montana—Montana Revised Code Annotated § 95–608(d) (1969) authorizes arrest without a warrant if "the existing circumstances require * * * immediate arrest." As construed (*State* v. *Bennett,* 158 Mont. 496), this allows an arrest without a warrant even though there is time to obtain one. Under *Bennett,* Section 95–608 has been construed as coterminous with the Fourth Amendment, and the only requisite of an arrest is probable cause.

New Mexico—No statute specifically authorizes warrantless arrest. New Mexico Statutes Annotated § 41–1–5 (1973) requires prompt arraignment, and Section 41–1–6 (1973) recognizes, although it does not authorize, warrantless arrests for misdemeanors. New Mexico courts consistently have approved warrantless arrests. *Territory* v. *McGinnis,* 10 N.M. 269; *State* v. *Barreras,* 64 N.M. 300; *State* v. *Selgado,* 76 N.M. 187.

North Carolina—North Carolina General Statutes § 15–41 (1965) states that warrantless arrest is authorized when an officer has "reasonable ground" to believe a felony is being committed in his presence, or reasonable ground to believe the suspect will evade arrest if not immediately taken into custody. By judicial construction, a peace officer is entitled to arrest without warrant pending an "inquiry" into probable cause. *Neal* v. *Joyner,* 89 N.C. 287. See generally Coates, *The Law of Arrest in North Carolina,* 15 N.C. L. Rev. 101 (1936).

Pennsylvania—Pennsylvania Statutes Annotated, Tit. 19, § 12.7 (Supp. 1974) preserves the common law powers of arrest. At common law in Pennsylvania, warrantless arrests were proper. *Commonwealth* v. *Bosurgi,* 411 Pa. 56, certiorari denied, 375 U.S. 910; *Commonwealth* v. *Smith,* 225 Pa. Super. 509.

Texas—A warrant is preferred as the method of arrest. *Honeycutt* v. *State,* 499 S.W. 2d 662 (Ct. of Crim. App.). However, extensive exceptions are created by Texas Code of Criminal Procedure Arts. 14.01 and 14.04 (1974), and in most cases probable cause will support an arrest. *Ciulla* v. *State,* 434 S.W. 2d 948 (Ct. of Civ. App.); *Caffey* v. *State,* 433 S.W. 2d 900 (Ct. of Crim. App.). See generally Potts, *The Law of Arrest,* 1 Baylor L. Rev. 397 (1949).

U.S. GOVERNMENT PRINTING OFFICE: 1975